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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Appellants,

v.

LONE STEER, INC.,
Appellee.

On Appeal from the United States District Court for the District of North Dakota

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Whether the Secretary of Labor (through his agents) may enter upon the premises of a business establishment and proceed with an unlimited-in-scope inspection of the records of that business pursuant to Section 11(a) of the Fair Labor Standards Act (29 U.S.C. § 211) without having first obtained a judicially issued search warrant.

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INTERESTS OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a national non-profit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulation, judicial procedure, and constitutional law involving the rights of citizens and businesses. WLF has appeared in the United States Supreme Court on many occasions as *amicus curiae*. *See, e.g., Moody v. State of Alabama, ex rel. Tharpe Forrester*, No. 82-740 (U.S. filed Oct. 28, 1982), *cert. denied*, 51 U.S.L.W. 3612 (U.S. Feb. 22, 1983); *General Building Contractors Ass'n v. Pennsylvania*, 102 S.Ct. 3141 (1982); *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 447 U.S. 530 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the general public by urging the Court to affirm the decision of the United States District Court for the District of North Dakota. The district court correctly held that the Secretary of Labor may not proceed to enter upon a business' premises for the purpose of inspecting its records under Section 11(a) of the Fair Labor Standards Act without first having obtained a valid search warrant. This holding is consistent with the history of the fourth amendment. Moreover, it accords with recent past decisions of this Court which have stressed that warrantless administrative searches constitute an unreasonable intrusion upon the fourth amendment rights of businessmen.

The present parties to this controversy are primarily concerned with the legality of the Secretary of Labor's actions insofar as they concern the activities of Lone Steer, Inc. For this reason, the larger public interest issues may not receive the full consideration they de-

serve. The participation of the Washington Legal Foundation will assist this Court in better understanding these issues and in reaching the result that will best serve the public interest.

Both parties have consented to the filing of this *amicus curiae* brief in papers which have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the Statement contained in the Brief for the Appellants at 4-10. However, in order for the constitutional issues presented by this case to be viewed in their proper context, *amicus* wishes to stress the following.

The instant controversy originated on January 6, 1982 when a compliance officer with the Wage and Hour Division of the United States Department of Labor (appellants) telephoned Lone Steer, Inc. (appellee) and informed its manager that an unexpected, and unlimited-in-scope investigation of Lone Steer's business records would commence at 9:00 a.m. the following morning (J.S. at 2a). Lone Steer refused to consent to the proposed investigation and appellants subsequently sought to have the investigation rescheduled a week later on January 14, 1982. Following an exchange of correspondence and telephone calls, counsel for the appellee attempted to discover the reasons for the administrative investigation of his client's business records and what its precise scope would be. Consent to conduct an on-the-premises search was withheld pending appellants' response to this inquiry.

Several days later, on January 20, 1982, the Assistant Regional Administrator for the Wage and Hour Division of the Department of Labor notified Lone Steer by letter that the underlying motive for the investigation would not be given. The letter also refused to disclose the precise scope the proposed administrative investigation would

take. For these reasons, Lone Steer continued to refuse to allow the Administrator's agents to enter upon its premises to conduct the required search of its business records. Subsequently, however, on February 2, 1982, government agents did enter appellee's premises under instructions to carry out the proposed unlimited-in-scope administrative investigation. However, since Lone Steer's manager was unavailable to assist in the search, the agents instead served a Lone Steer employee with an administrative subpoena duces tecum requesting the production of certain records and then left the premises.*

In response to the abortive investigation, appellee's attorney commenced this action against appellants in the United States District Court for the District of North Dakota. The complaint alleged, *inter alia*, that "[t]he Defendants' investigation pursuant to Section 11 and 9 of the Fair Labor Standards Act (29 U.S.C. § 211) constitutes and [sic] unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution." The Secretary of Labor subsequently petitioned the district court to compel appellee to comply with the administrative subpoena whereupon the district court consolidated the two actions.

On October 27, 1982 the district court granted summary judgment in favor of the appellee holding that "the Secretary of Labor may not proceed [through his agents] to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the

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* The "limited" subpoena demonstrates how unlimited the proposed on-the-premises search would have been since it requires Lone Steer to produce "[r]ecords showing, for the three-year time period prior to this subpoena, (1) the dollar volume of sales made or business done; [and] (2) the names and addresses of businesses from whom Lone Steer, Inc., has purchased goods or supplies." (J.A. at 26.) *Amicus* is puzzled as to what possible relevance the production of all these documents has to the Secretary's investigation of whether Lone Steer is complying with the Fair Labor Standards Act of 1938.

Fair Labor Standards Act without first having obtained a valid warrant" (J.S. at 8a). The Court's judgment was premised upon this Court's ruling in the case of *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), which held that a warrantless inspection of business premises pursuant to § 8(a) of the Occupational Safety and Health Act of 1970 violated the fourth amendment.

SUMMARY OF ARGUMENT

The district court's ruling that the Secretary of Labor may not proceed to enter upon premises of a business for the purpose of inspecting its records under Section 11(a) of the Fair Labor Standards Act without first having obtained a valid warrant is consistent with the rights afforded businesses under the fourth amendment to the Constitution and with recent past decisions of this Court.

The fourth amendment prohibits all unreasonable searches that are not accompanied by a warrant. Historically, the framers of the amendment intended employers to be a class protected by its provisions. Moreover, in a line of recent cases beginning with *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court has strongly reemphasized that commercial offices enjoy nearly the same fourth amendment protections from unreasonable searches as private dwellings. Because the proposed on-the-premises unlimited-in-scope administrative inspection of Lone Steer's business records constituted a significant intrusion into its business affairs, Lone Steer's privacy rights under the fourth amendment were clearly implicated and a judicially-ordered search warrant was necessary if the proposed investigation was to proceed.

This conclusion is reinforced by this Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). In *Barlow's*, a case whose facts are substantially similar to those *sub judice*, the Court held that the Secretary of Labor must obtain a search warrant prior to conducting

an inspection of a business establishment pursuant to § 8(a) of the Occupational Safety and Health Act. A principal concern of this Court in *Barlow's* was to protect business employers against unreasonable governmental intrusion by having a neutral and detached magistrate closely scrutinize administrative inspection programs. Despite the fact that the search in *Barlow's* was conducted in order to protect the health and safety of employees, this Court found that a warrant was necessary. *A fortiori*, a warrant is required here where entry is sought merely for the purposes of determining compliance with wage and hour regulations. Accordingly, the reasoning of the *Barlow's* Court is fully applicable and dispositive of the present controversy.

ARGUMENT

I. The Fourth Amendment Was Intended to Protect Businesses Against Warrantless Searches.

This Court has long recognized that history sheds much light upon the meaning and scope of the various protections embodied in the Constitution. This is particularly true in the context of the fourth amendment which provides a rich historical background rooted in the American colonial experience.

The fourth amendment provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While *amicus* has no intention of reviewing the history of this amendment in detail, it is important to emphasize that it was designed with two purposes in mind. "[A] reaction to the evils of the use of the general warrant in

England and the writs of assistance in the colonies, . . . [it] was intended to protect against invasions of 'The sanctity of a man's home and the privacies of life.'" *Warden v. Hayden*, 387 U.S. 294, 301 (1967). Equally important, however, is the historical fact that the fourth amendment was intended to afford a fundamental right to employers to be left free from intrusive and unreasonable searches of their business premises by overzealous government agents.

> This amendment is the one procedural safeguard in the United States Constitution that grew out of the virtually unrestrained and judicially unsupervised searches immediately preceding the revolutionary struggle with England. The writs of assistance issued by the Crown to search warehouses, stores and homes for smuggled goods were considered extremely obnoxious by the Colonists. Historically, employers were thought to be a class protected by the fourth amendment.

Note, *Marshall v. Barlow's, Inc.: Are Employer's Fourth Amendment Rights Protected?* 16 Case W.L. Rev. 161, 163 (1980) (footnotes omitted). *See also United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) (". . . it cannot be doubted that the Fourth Amendment's commands grew in large measure out of the Colonists' experience with the writs of assistance . . . [which] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.") It is clear therefore that the ban on warrantless searches contained in the fourth amendment was intended by its Framers to shield places of business as well as private dwellings. Thus in the criminal context, this Court has repeatedly refused to sanction unreasonable warrantless searches that were directed at commercial rather than residential premises. *See, e.g., Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

With the growth of federal regulatory agencies, this Court was forced to consider whether warrantless searches

conducted pursuant to administrative inspection programs infringed upon the rights afforded employers under the fourth amendment. Initially, a divided Court reasoned that the interests of the businessman in this instance were not protected by the fourth amendment but were merely on the "periphery" of the interests protected by the Constitution. *Frank v. Maryland*, 359 U.S. 360, 367 (1959). Subsequent decisions, however, have repudiated this ahistorical reading of the fourth amendment and have strongly reaffirmed that the fourth amendment rights of employers are not merely "peripheral" but are fully protected under that provision.

For example, in *Camara v. Municipal Court*, 387 U.S. 523 (1967), a municipal health inspector sought entry into a citizen's dwelling in order to conduct an inspection for health code violations pursuant to an administrative inspection plan. This Court, however, found that the inspection contravened the fourth amendment holding that a warrant was required in the administrative inspection context. "[E]xcept in certain carefully defined classes of cases a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Id.* at 528-529. Supporting the conclusion reached by the Court in *Camara* were findings that unless a warrant was required in the administrative inspection context, officers in the field would have unbridled discretion to search private property as they pleased. *Id.* at 531.

The conclusions drawn in *Camara* were reinforced in *See v. City of Seattle*, 387 U.S. 541 (1967). *See* was the companion case to *Camara* and it held that the protections against warrantless administrative searches afforded the owners or occupiers of private dwellings applied to business establishments as well. Its reasoning is worth quoting at length:

> As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted

> without a warrant. *The businessman*, like the occupant of a residence, *has a constitutional right to go about his business free from unreasonable official entries upon his commercial property.* The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

See v. Seattle, 387 U.S. 541, 543 (1967) (emphasis added).

Decisions subsequent to *Camara* and *See* have established a limited number of exceptions to the warrant requirement in the administrative inspection context. *Colonade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972).

The gravamen of these two decisions is that certain industries have such a history of government oversight that no reasonable expectation of privacy, *see Katz v. United States*, 389 U.S. 347 (1967), exists. Liquor (*Colonade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulations.

Industries such as these fall within the "certain carefully defined classes of cases," referred to in *Camara*. 387 U.S. at 528. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. This Court has emphasized, moreover, that the *Colonade* and *Biswell* decisions are "exceptions" and "responses to relatively unique circumstances." *Marshall v. Barlow's*, 436 U.S. 307, 313 (1978).

In sum, the history of the fourth amendment and subsequent fourth amendment jurisprudence as articulated

by this Court demonstrate that except in exceptional circumstances business premises are protected against warrantless searches conducted pursuant to an otherwise valid administrative inspection scheme.

II. This Court's Decision in *Marshall v. Barlow's, Inc.* Is Fully Dispositive of the Instant Case.

The lines of cases beginning with *Camara* and *See* established the principle that, except in the case of a pervasively regulated industry, a government administrative agent must obtain a search warrant based upon probable cause before entry upon an employer's premises to perform an administrative inspection will be constitutionally permissible under the fourth amendment. In *Marshall v. Barlow's, Inc.*, a case whose facts strongly resemble those *sub judice*, this Court was called upon to decide whether the warrantless search provisions of section 8(a) of the Occupational Safety and Health Act of 1978, 29 U.S.C. § 657(a), were repugnant to the fourth amendment. Section 8(a) authorized agents of the Secretary of Labor to search the work area of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations without a warrant.

The controversy in *Barlow's* arose when an OSHA compliance officer sought to conduct a search of the working areas of Barlow's Incorporated, an electrical and plumbing installation business. When asked by company president, Mr. Barlow, if there had been any complaint by an employee, the compliance officer answered no. The president then informed the compliance officer that an inspection could not be made without a warrant, stating that he was relying upon his rights as guaranteed by the fourth amendment.

Three months later the Secretary of Labor petitioned the federal district court for the district of Idaho to issue an order compelling Mr. Barlow to admit the inspector.

The requested order was issued and presented to Mr. Barlow who again refused entry and sought injunctive relief against the warrantless searches provided for under the Act. A three-judge court convened and ruled in Mr. Barlow's favor enjoining enforcement of section 8(a) of the Act. This Court then noted probable jurisdiction, reviewed the case and affirmed the Idaho district court decision. *Barlow's*, 436 U.S. at 309-310.

In reaching its decision, the Court first focused upon the private property interests of businessmen protected from warrantless government intrusions. *Id.* at 311. It reviewed the history of the fourth amendment and found that these interests suffered whether the intrusions by the government were performed in order to investigate alleged violations of the criminal laws or breaches of regulatory standards. *Id.* at 311-312. Consequently, the Court concluded that unless some recognized exception to the fourth amendment's warrant requirement applied, the OSHA compliance officer would need to obtain a warrant to conduct the planned inspection of Mr. Barlow's business premises. "[U]nless some recognized exception to the warrant requirement applies, *See v. Seattle* would require a warrant to conduct the inspection. . . ." *Id.* at 313.

In response, the Secretary of Labor advanced three arguments: (1) that the industry in question was pervasively regulated; (2) that the employer had no "reasonable expectation of privacy"; and (3) that requiring a warrant would cripple the effectiveness of the Act. The Court rejected all three arguments as untenable. First, the Court found no implied consent to a warrantless search under the *Colonade-Biswell* exception. *Id.* at 313-315. Second, the Court found that the employer had a reasonable expectation of privacy and that a warrant would be necessary not only to require a neutral officer's review of the administrative plan but to apprise the employer of the scope and object of the inspection. *Id.* at 322-324. To quote directly from the opinion:

> Nor do we agree that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed. The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable. . . . [It would] [a]lso . . . advise the owner of the scope and objectives of the search, beyond which the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541 (1967).

Id. (footnotes omitted).

Finally, the Court rejected the argument that the effectiveness of the Act would be crippled: "[T]he Act's effectiveness has not been crippled by providing those owners who wish to refuse an initial requested entry with a time lapse, while the inspector obtains the necessary process." *Id.* at 318.

The Court's reasoning in *Barlow's* is equally applicable to the facts of this case. Section 11(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 211(a), similar to the sweeping inspection language contained in section 8(a) of the OSHA, gives the Secretary of Labor and his agents in the field, broad unbridled discretion ". . . to investigate and gather data regarding the wages, hours, and other conditions of employment" and ". . . to enter and inspect such places and records . . . as he may deem necessary. . . ." No warrant is required to be obtained prior to the search.

Pursuant to Section 11(a) the Secretary, acting through his agents, attempted to enter the premises of Lone Steer

to conduct an unlimited-in-scope inspection of its business records in order to determine if this business was acting in compliance with the Act. However, as in *Barlow's*, the Secretary was repeatedly refused entry onto the premises until such time as he obtained a judicially issued warrant that would delineate the precise scope of the search. The Secretary is now seeking to have this Court retreat from its holding in *Barlow's* by overturning the district court ruling that a warrant is necessary in these circumstances. Yet *Barlow's* is so dispositive of this controversy that such a position is entirely untenable.

First, it cannot be doubted that the warrantless administrative search procedure authorized under section 11(a) of the FLSA implicates the fourth amendment constitutional right of a businessman to be free from nonconsensual official entry onto his private property. *Cf.*, *See v. City of Seattle*, 387 U.S. at 545 (". . . administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled . . . within the framework of a warrant procedure").

Second, the proposed inspection does not fall within the purview of the *Colonade-Biswell* exception to the warrant requirement. Government oversight of wages and hours simply does not approximate the pervasiveness of regulations upon which a finding of implied consent could be made. *See*, *Marshall v. Barlow's, Inc.*, 436 U.S. at 314 (finding unconvincing the suggestion that implied consent to warrantless searches could be found through the Walsh-Healey Act's provision relating to the "imposition of minimum wages and maximum hours on employers").

Finally, it is clear that the FSLA would not be frustrated by requiring a warrant for a surprise on-the-premises search of an employer's wage and hour records. Other means exist to insure compliance with the Act's provisions such as the use of an administrative subpoena

duces tecum. The Secretary concedes as much in that in his Motion to Alter or Amend Judgment he did not contest the district court's order prohibiting him from entering upon Lone Steer's premises to conduct a warrantless search. Instead, the Secretary simply sought to have a paragraph added to the Order that would require the administrative subpoena duces tecum to be enforced. *See* J.S. at 16a.

III. Public Interest Considerations Dictate That This Court Reaffirm *Barlow's* by Holding That the Proposed On-the-Premises Search of Lone Steer's Business Records Is Unconstitutional Absent a Judicially Ordered Warrant.

Over fifteen years ago in *See v. City of Seattle*, Justice White accurately took notice of the fact that:

> As governmental regulation of business enterprise has mushroomed in recent years, the need for effective investigative techniques to achieve the aims of such regulation has been the subject of substantial comment and legislation. Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws . . . .

387 U.S. at 543-44. Today the governmental regulation of business enterprise has increased even more. With this increase in regulatory supervision has come increased interference and harassment of small businessmen by government regulatory agencies. For example, it has been reported that in 1982 alone, the Department of Labor conducted close to 74,000 investigations of business wage and hour records under the Fair Labor Standards Act similar to the investigation it sought to carry out against Lone Steer. Mauro, *Government vs. Business Privacy*, Nation's Business, September 1983, at 64.

The increasing tendency of government bureaucrats to interfere with the working of small businesses like Lone

Steer conflicts with the "basic purpose" of the fourth amendment which "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara*, 387 U.S. at 528.

As already demonstrated, the warrant clause of the Fourth Amendment protects commercial dwellings as well as private homes. *Marshall v. Barlow's, Inc.*, 436 U.S. at 312. The purpose behind the warrant requirement is to insure that the judgment of a neutral and detached magistrate is imposed against the unbridled discretion of an official caught up in the heat of an investigation. *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Small businessmen across the country would see their fourth amendment rights eviscerated if the Court were to renege on its holding in *Barlow's*. To allow government agents to conduct unlimited-in-scope searches of business records is an open invitation to abuse of power. Only by requiring administrative inspectors to obtain a judicially issued warrant can there be any protection against this erosion of the rights of businessmen.

CONCLUSION

For all of the foregoing reasons, the Washington Legal Foundation submits that this Court should affirm the district court.

Respectfully submitted,

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